aside a portion of the earnings and devote them to the permanent use of the corporation in any form whatsoever converts such earnings into capital. This determination is binding upon the stockholders, and, manifestly, if shares are issued to represent these earnings converted into capital, they are none the less capital, and there is no distribution of income. Hence the action of the corporation, so long as within its authority, must determine whether stock dividends are capital or income. *Bouche* v. *Sproule* (1887) L. R. 12 App. Cas. 385; *In re Barton's Trust*, supra; *Hooper* v. *Rossiter* (1824) 1 M'Clel. 527; *Leland* v. *Hayden* (1869) 102 Mass. 542; *Heard* v. *Eldredge* (1872) 109 Mass. 258; *Rand* v. *Hubbell* (1874) 115 Mass. 461. This doctrine is also well supported, *Gibbons* v. *Mahon* (1890) 136 U. S. 549; *Spooner* v. *Phillips* (1892) 62 Conn. 62; *Greene* v. *Smith* (R. I. 1890) 19 Atl. 1081; *De Koven* v. *Alsop* (1903) 205 Ill. 309; cf. 5 Am. Law Rev. 720; 4 COLUMBIA LAW REVIEW 130, and, it is submitted, offers the more logical and practical working rule. It gives effect to the legal and economic theory of dividends and no complicated investigation into the affairs of the corporation is necessary. See Perry, Trusts, 5th ed., § 545 and note p. 91. Obviously, since the usual object of issuing stock dividends is to retain earnings for permanent use, such dividends will generally be found to be capital and go with the corpus of the trust fund, but it should be observed that this doctrine does not have the effect of laying down an arbitrary rule that all cash dividends are income and all stock dividends capital, for it has been held, under this view, that dividends of cash acquired from the sale of the capital or permanent assets go to the remainderman, *Heard* v. *Eldredge*, supra, and on the other hand that where the corporation bought in its own stock with earnings and divided such stock, such earnings had in no way been set aside as permanent assets, and such stock dividend went to the life tenant. *Leland* v. *Hayden*, supra.

RIGHT OF A CORPORATION TO ACQUIRE ITS OWN STOCK.—England and a few American jurisdictions have denied the right of a corporation, on common law principles in the absence of express authorization, to acquire its own stock, the decisions being based in the main on one or more of three grounds; excess of corporate capacity because of inconsistency with the nature of corporate organization, *Trevor* v. *Whitworth* (1887) 12 App. Cas. 409; *Coppin* v. *Greenlees & Ransom Co.* (1882) 38 Oh. St. 275; Morawetz, Corporations § 112; fraud upon creditors, *Crandall* v. *Lincoln* (1884) 52 Conn. 73; 2 Thompson, Corporations § 2048; and breach of the fundamental agreement between shareholders themselves and also with the State. Cf. *Lowe* v. *Pioneer Threshing Co.* (1895) 70 Fed. 646; Morawetz, Corporations § 112. If the acquisition of its own stock is in excess of the power of a corporation then the doctrine of ultra vires should control all such transactions. The fact is, however, that all American jurisdictions admit the power of a corporation to acquire its own stock in certain cases on the ground of necessity to protect itself from loss, *City Bank of Columbus* v. *Bruce* (1858) 17 N. Y. 507; *State Bank of Ohio* v. *Fox* (1853) 3 Blatchf. 431; Morawetz, Corporations § 114, and this door of necessity has been opened wide enough to include compromises of disputes between stockholders. *Morgan* v. *Lewis* (1888)

46 Oh. St. 6. And see *Cinn. H. and D. R. R.* v. *Duckworth* (1887) 2 Oh. C. C. R. 578; *New Albany* v. *Burke* (1870) 11 Wall. 96. Thus it would seem that in this country the preferable rule is that a corporation can acquire its own stock, at least for legitimate corporate purposes, testing the transaction by principles similar to those applied in the acquisition of other kinds of property. *Dupee* v. *Boston Water Power Co.* (1873) 114 Mass. 37; *Chicago, P. and S. R. R.* v. *Marseilles* (1876) 84 Ill. 45; Cook, Stock § 311. Similarly, it has been held that a grant of power to acquire property generally for corporate purposes gives an implied power to the corporation to acquire its own stock. *Iowa Lumber Co.* v. *Foster* (1878) 49 Ia. 26; *Chapman* v. *Iron Clad Rheostat Co.* (1898) 62 N. J. L. 497. As to the other grounds on which the power of a corporation to acquire its own stock has been denied it seems that they are correctly regarded only as circumstances to be considered in the determination of the validity and legal effect of the particular transaction. Cf. *Lowe* v. *Pioneer Threshing Co.*, supra. Thus in all states, even where the courts have found no principle of common law violated in transactions whereby corporations have become holders of their own stock, the rule is rigorously applied, which requires good faith on the part of the corporation with no intended nor actual injury to creditors as a result of the acquisition. *Clapp* v. *Peterson* (1882) 104 Ill, 26; Cook, Stock § 312. But an assenting or subsequent creditor cannot complain. *First Nat. Bank* v. *Salem C. Flour Mills* (1889) 39 Fed. 89; *Shoemaker* v. *Washburn Lumber Co.* (1887) 97 Wis. 589. Many cases where the power has been denied can be reconciled by an application of this rule. *Savings Bank* v. *Nulfekuhler* (1877) 19 Kan. 60; Cook, Stock § 311. The transfer of stock to the corporation does not divest the stockholder of his statutory or other liability to creditors of the corporation. Cook, Stock § 251 and cases cited. On the other hand a stockholder who has not assented and whose rights would be injured is entitled to relief, *Price* v. *Pine Mt. I. and C. Co.* (Ky. 1895) 41 S. W. 1020; *Lowe* v. *Pioneer Threshing Co.*, supra, and it has been held that quo warranto does not lie against a corporation for acquiring its own stock. *State* v. *Minn. Thresher Mfg. Co.* (1890) 40 Minn. 213.

The present attitude of the courts in determining the effect to be given to an acquisition of its own stock by a corporation may be seen in *Knickerbocker Imp. Co.* v. *State Board of Assessors*, decided March 4th, 1907, by the New Jersey Court of Errors and Appeals. The prosecuting corporation contended that having power to acquire its own stock for legitimate corporate purposes it was entitled to a reduction of its franchise tax to the extent of the stock thus acquired. The decision, although holding that the corporation could not by corporate in-buying of its own stock avoid its liability under the Franchise Tax Act, carefully examines and passes upon the legitimacy of the means practiced by the corporation in acquiring its stock. The record disclosed that the full issue of the prosecuting corporation's stock was subscribed for by an existing corporation giving indefinitely its "rights and everything" as consideration therefor. By the same contract there was an agreement to return seventy-five per cent. of this stock for the creation of "treasury stock" to be sold as "fully paid and non-assessable," thus providing working

capital for the new corporation. It was held that the creation of treasury stock under the circumstances was not a legitimate corporate purpose. From the nature of the transaction the return of the stock could not be upheld as a gift, although it is recognized that gifts and bequests are valid methods by which a corporation may acquire its own stock. *Riv. Nav. Co.* v. *Dawsons* (Va. 1843) 3 Gratt 19; Cook, Stock § 42, note. The decision exposes a not uncommon method of corporate organization in recent years and properly stamps it as illegitimate, *Olling et al.* v. *Wenzel et al.* (1890) 133 Ill. 264, although in a similar case the transaction was apparently not so accurately penetrated and characterized by the court. *Lake Superior Iron Co.* v. *Drexel* (1882) 90 N. Y. 87. In each case where the right of acquiring its own stock is involved the circumstances and purposes of the corporation must be examined. If the courts can find a legitimate corporate purpose that is advanced without injury to creditors, they do not hesitate to uphold the transaction. *Whitaker* v. *Grummond* (1888) 68 Mich. 249 and cases supra. But cf. *Md. Trust Co.* v. *Nat. Mech. Bank* (1906) 102 Md. 608.

JURISDICTION TO APPOINT GUARDIANS OF THE PERSON.—Four grounds for jurisdiction to appoint a guardian of the person or to award custody of children, have been acted upon in the decided cases:—(1) the "status" of father and child, status being used in a loose and inaccurate sense to designate the relation of father and child and regarded as a *res;* (2) domicile of the ward; (3) mere residence of the ward; (4) the nationality of the ward.

It is submitted that the cases in which the relation, called a "status," was treated as a *res* for purposes of jurisdiction upon substituted service are erroneous. They are seriously impugned by *Haddock* v. *Haddock* (1906) 201 U. S. 562. Such cases are:—*In re Newman's Estate* (1888) 75 Cal. 214; *Brenot* v. *Brenot* (1894) 102 Cal. 294. See also 2 Bishop, Mar. & Div., 2nd ed., 1189, and *De la Montanya* v. *De la Montanya* (1896) 112 Cal. 105, where the judges were unable to agree.

That the court of the ward's domicile may appoint a guardian of the person is universally conceded. See *Lamar* v. *Micon* (1884) 112 U. S. 452. The view expressed in that case that a "guardian is most fitly appointed at the domicile of the ward," is well supported in a recent Texas case, in which a father and his infant child, domiciled in Louisiana, and the divorced wife and mother, domiciled in Kentucky, all being temporarily in Texas, the wife petitioned the court to award her the custody of the child. It was held that the "court had no authority to adjudge a change of relation between father and child"; and (semble) "the question at issue belonged to the jurisdiction of the domicile of the father," which was the constructive domicile of the child. *Lanning* v. *Gregory* (1907) 99 S. W. 542. It has been held that the court of the domicile will not award custody of a child where it is absent from the jurisdiction, *Kline* v. *Kline* (1881) 57 Ia. 386; *De la Montanya* v. *De la Montanya* (1896) 112 Cal. 105, though in the latter case the wife sued and the father, the legal custodian, was also outside the jurisdiction and served by publication. On this last point the opposite result was reached in *Wakefield* v. *Ives* (1872) 35 Ia. 238, the case apparently rest-